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IN THE

SUPREME COURT OF THE UNITED STATES

SURESH KUMAR a/k/a SAM KUMAR,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether 18 U.S.C. 844(i) is a valid exercise of Congress's power under the Commerce Clause of the Constitution.

2. Whether, in light of *United States* v. *Lopez*, 514 U.S. 549 (1995), and the interpretative rule that constitutionally doubtful constructions should be avoided, 18 U.S.C. 844(i) applies to the alleged arson of a hotel in which 3/4 of the guests did not come from another state, and if so, whether the application of 18 U.S.C. 844(i) to the hotel in the present case is constitutional when the government fails to introduce proof that the hotel attracts sufficient guest from other states to substantially affects interstate commerce.

PARTIES TO THE PROCEEDING

Petitioner is Suresh Kumar, also known as Sam Kumar, an individual currently serving a sentence of life imprisonment in the Federal Penitentiary in Atlanta, Georgia . Petitioner Kumar was the Defendant in the district court and the Appellant in the Court of Appeals for the Sixth Circuit.

Respondent is the United States of America.

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OPINIONS BELOW

The court of appeals denied the defendant's Petition for Rehearing by means of an unpublished decision. (39a). The earlier opinion of a three-judge panel of the court of appeals is an unpublished decision, 187 F. 3d 639, the text of which may be found at 1999 WL 551353. (1a - 38a).

JURISDICTION

On July 9, 1997, the district court sentenced Kumar to a term of life imprisonment. Kumar thereafter filed a timely Notice of Appeal on July 18, 1997. On July 19, 1999 the court of appeals entered an Opinion which affirmed the District Court in all respects.

Kumar subsequently filed a timely Petition for Rehearing with suggestion of en banc hearing, which the Court of Appeals denied on September 3, 1999. (39a)

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The notice provisions of Rule 29.4(b) are not applicable, as the United States is a party to this proceeding.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power . . . To Regulate Commerce . . . among the several states."

2. The federal arson statute, 18 U.S.C. § 844(i), provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

3. The federal conspiracy statute, 18 U.S.C. § 371, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the

> United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

4. The federal mail fraud statute, 18 U.S.C. § 1341, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

Basis for Jurisdiction in the District Court

This appeal arises from a conviction in a criminal proceeding in the United States District Court for the Western District of Kentucky, Bowling Green Division. The Defendant, Suresh Kumar, known as Sam Kumar, was indicted on July 1, 1996. The indictment alleged that the Howard Johnson's Hotel located in Bowling Green, Kentucky was a building which affected interstate commerce and that Kumar and two co-defendants, Joe Logan, Sr. and Devinder Sharma, conspired to destroy the hotel by means of arson in violation of 18 U.S.C. §§ 371 and 844. The indictment also alleged that the Defendants committed mail fraud in submitting a false insurance claim by means of the U.S. Mail, in violation of 18 U.S.C. § 1341.

Procedural History

On January 6, 1996, a fire destroyed the Howard Johnson's Hotel in Bowling Green, Kentucky. The United States Attorney for the Western District of Kentucky filed a complaint against Kumar and Logan on June 25, 1996. An arrest warrant was issued and Kumar was taken into custody in his home state of Tennessee. Logan was taken into custody the same day at the Bowling Green office of the ATF. On June 27, 1996, the United States Attorney also filed a complaint against Dave Sharma and an arrest warrant was issued.

On July 1, 1996, Sharma, Logan and Kumar were indicted by the grand jury. The indictment alleged that they had destroyed the Howard Johnson's Hotel by means of fire, committed mail fraud, and engaged in a conspiracy. Kumar was arraigned on July 17, 1996, at which time he entered a not guilty plea on all counts. On July 24, 1996, Kumar filed a motion for a speedy trial and for a separate trial from that of the other defendants. The motion for

separate trials was denied. The court then set a trial date of September 30, 1996 for both defendants.[1] Kumar was denied bond and was detained throughout the proceedings below.

On September 10, 1996, Logan advised the court that he intended to introduce evidence of his mental condition and filed a motion to continue the September 30 trial date. Both Kumar and the United States objected to the request for a continuance. On September 13, 1996, Kumar filed a renewed motion for separate trials and moved to suppress certain evidence proffered by the United States. Five days later, on September 18, Kumar filed a motion to prohibit the United States from seeking the death penalty. On September 19, the trial court denied Kumar's motion to suppress evidence of fires that had occurred at a Nashville Travelodge Hotel owned by Kumar. The following day, September 20, 1996, the trial court denied Kumar's motion for separate trials and granted Logan's motion for a continuance. The trial court assigned a January 6, 1997 trial date.

On November 26, 1996, Kumar filed a new motion for separate trials. On Friday, January 3, 1996, the trial court denied Kumar's motion for separate trials. The jury trial commenced the following Monday, January 6, 1997 and concluded approximately seven and one-half weeks later. On February 28, 1997, the jury returned a verdict of guilty on all counts against Kumar. Logan was convicted of the conspiracy and arson counts, but was acquitted of the mail fraud charge. On March 5, 1997, Kumar filed a timely motion for judgment notwithstanding the verdict and motion for a new trial. On May 14, 1997, the trial court denied Kumar's post-trial motions.

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[1] The arrest warrant for Sharma was never executed.

On June 23, 1997, the trial conducted a sentencing hearing. The trial court entered a sentencing order on July 9, 1997. The order imposed a sentence of life imprisonment for both the arson and conspiracy charges and five years imprisonment for the mail fraud charge. Kumar filed a timely notice of appeal on July 18, 1997. The court of appeals affirmed the conviction in all respects.

Factual History

Sam Kumar was born in India. He trained as a helicopter pilot and immigrated to the United States. He worked first as a pilot, but later started working at a hotel located in Dyersburg, Tennessee. He later purchased the hotel, renovated it and sold it for a profit. Ray Patel, a family acquaintance and owner of Walker's Hotel in the Memphis, Tennessee area, stated that he was familiar with the Dyersburg hotel and that he was not aware of any fires at the hotel during the period that Kumar owned it. Mr. Patel also stated that he believed that Kumar used the proceeds of the sale to purchase a hotel in Nashville.

Kumar and his wife Monica purchased a hotel in Nashville, Tennessee in July 1993. In November, the hotel became licensed as a Travelodge. In February 1995, Kumar, his wife Monica, and her brother Dave Sharma, formed SMD, Inc. The corporation purchased the Howard Johnson's hotel in Bowling Green, Kentucky on March 25, 1995. The hotel was deteriorating somewhat at the time it was purchased by SMD. Kay Carter, a longtime employee of the hotel under its previous management, testified that renovations were made after the purchase by SMD. The renovations included new carpet, drapes, televisions and painting.

The Howard Johnson's had approximately 112 guestrooms available for rent. Steve Wheeler, a CPA and Certified Financial Planner with the firm of J.C. Holland in Bowling Green, Kentucky, calculated that the corpora-

tion operated the Howard Johnson's on a profitable basis prior to the fire. Specifically, Wheeler's expert opinion was that the net income of the hotel was in the range of $49,000 to $60,000 during the March 1995 to January 1996 time period.

As noted above, the Howard Johnson's was destroyed by fire in the early morning hours of January 6, 1996. On January 11, 1996, the National Response Team of the ATF announced that the fire was caused by arson. Initially, the ATF considered a group of young adults in room 116 of the hotel as the prime suspects. Joyce Smith, an employee on duty the night of the fire, testified that a group of young teenagers were having a party in room 116. They became loud and security was called. She also stated that she heard someone run across the roof of the atrium section of the hotel prior to the fire.

Victoria Sousa, a guest at the hotel on the night of the fire, provided additional support for the possibility that teenage guests started the fire. Sousa testified that there seemed to be a lot of teenagers having a party the evening of the fire. Her family went to sleep after the 10:00 p.m. news, but she awoke after hearing voices outside her room:

> I heard voices. When I first came awake my impression was, my first thought was, oh, these teenagers are out there doing something they're not supposed to be doing. But just general, I'm pretty tolerant about things like that, that don't usually bother me. What bothers me was that, you know, the thing I was hearing them say indicated that fire was, had something to, they were lighting something or something to that nature.

Sousa started to go back to sleep, but she heard similar voices say something to the effect of "Come on, man. That's enough. Let's get out of here. We got to go. That's enough, let's get out of here, it's going to blow." Her family woke up

and she started to get the kids dressed. Her fiancé then looked out the room window and saw flames. They left the hotel and ended up in their car at 1:21 or 1:22 a.m. Sousa stated that less than 15 minutes passed from the time she heard the first noises to the time she saw the clock in the car.

The ATF also considered Michael Price a potential cause of the fire. Price was a guest at the hotel. Price visited a Bowling Green strip bar the night of the fire and consumed approximately 12 beers. He left the strip bar at midnight, having made arrangements to meet April Burke, a dancer at the strip bar, at the Howard Johnson's after she was off work. Price claimed that he dropped a friend off at a convenience store and then went to the drive-through of a local Burger King restaurant before he arrived at the Howard Johnson's. Price claimed that he did not arrive at the hotel until 12:30 am, but could not explain how he could have visited the drive through after leaving the bar if the drive-through closed at midnight.

Price was one of the first persons to arrive at the scene of the fire. He testified that he went to the desk to get towels on two occasion after he checked in. The desk clerk did not have any towels at the desk when he went the second time, so the clerk went to another area of the hotel to retrieve some towels. Price heard a noise in the area where the clerk had gone to get towels and then heard two girls yell "fire." Price stated that he went to investigate and saw smoke coming from the door of a storage room. He opened the door and saw flames coming from a mattress.

Price claimed that he then started to fight the fire and used three fire extinguishers in the process. At some point, a man later identified as Ernest Evans helped Price break the first fire extinguisher free by using a small ladder to break the glass of the storage cabinet. Price testified that

he then returned to his room to retrieve a gym bag and placed it in his car. He then re-entered the hotel and pounded on doors to alert other guests of the fire.

Price was considered a possible cause of the fire because he was one of the first persons on the scene and because he lied to the ATF in his initial interviews with the agency. At trial, Price admitted that he lied to the ATF as to the reason he reserved a room at the hotel on the night of the fire because he did not want his wife to discover that he was going to meet April Burke. Notably, Price has had two house fires in his past. The first fire occurred in 1988 or 1989. He claimed that the fire occurred as he was sleeping with a woman. He claimed that he woke up coughing, noticed smoke and flames and exited the building. The second fire occurred in 1991. Price was in Bowling Green drinking at a bar called 'Yankee Doodles' the night of the fire. He claimed that he arrived home at 4:00 a.m. and discovered that the house had burned. Price retained counsel on or about January 20, 1996 and stopped cooperating with the ATF. Agent Wilt stated that the ATF no longer considered Price a suspect by January 23, 1996.

Ernest Evans, the other person identified as being at the scene of the fire when it was first discovered, also had a personal history of fire losses. Evans pleaded guilty to arson in 1988, but denied that he set the fire. Although the jury heard evidence regarding his conviction, the Defendants requests to inquire about other fires in Evans' background was denied by the trial court. Consequently, the jury was not permitted to hear Vicki Evans Rice testify that she once overheard Evans and his cousin agree to burn his house in 1973. The house was burned the same night of the conversation. The jury was also not permitted to hear Evans' sister, Penny, testify that he set his truck on fire in 1987 when he became angry. The Defendants were also denied the opportunity to present testimony from

Evans' son, Ernest Evans, Jr., that Evans asked him to start a fire in a camper in 1989.

Although Evans admitted that he lied to the ATF during the first several interviews and sworn statements because he was afraid of being accused of setting the fire, he became the prosecution's key witness at trial. Evans testified that he was a self-employed carpet installer until he injured his back in 1990. He became homeless and took to living under the Trinity Lane bridge in Nashville, Tennessee. Evans pawned his tools and used the money to rent a room at the Travelodge hotel operated by Kumar. Evans ran out of money and asked Kumar if he could work in return for room and board. Kumar agreed and hired him as a maintenance worker.

Evans was the vehicle by which most of the evidence alleged to implicate Kumar was transmitted to the jury. For example, Evans testified that Logan told him that Sharma offered him $3,500 January 2, 1996 to set a fire at the hotel. Evans also claimed that Sharma called his room late in the evening of January 4 and asked to speak with Logan, and that he then overheard Logan tell Sharma something to the effect that "everything is planned." Evans also testified that Logan told him on January 5 that the fire would happen over the weekend. Evans also claimed to have overheard two alleged conversations between Kumar and Logan several months after the fire. Specifically, Evans alleged that he overheard Kumar tell Logan in March or April 1996 that he could not pay him until the insurance company paid the fire loss claim. Evans also alleged that Kumar told Logan in late May that "it was a good fire, it just got out of hand." Kumar objected to each of the foregoing statements.

Evans' trial testimony differed greatly from the statements he gave to the ATF in January 1996. For example, in his January 11, 1996 statement Evans swore that Jerome

Jordan, a.k.a. 'Predator', told him of a plan to set a fire in the hotel. He did not implicate Logan or Kumar in the January 11 statement or the January 23 statement that followed. In his February 13 statement, Evans claimed that Logan told him of a plan to set a fire several days before the fire. Indeed, it was not until the middle of the trial that Evans first advised the ATF that he had lied about 'Predator' and that he had no involvement in the fire. Evans also admitted that he lied about not having an arson conviction in his statements to the ATF and in pretrial hearings. Evans attempted to explain his deception by claiming that he was afraid that the ATF would not believe him if he recanted the portions of his statements that implicated 'Predator' and that he might be accused of setting the Howard Johnson's fire because of his prior arson conviction.

Evans transmitted his self-serving account of the events leading up to the fire in two ways. First, he provided testimony as described above. Second, he agreed to tape record conversations between himself and Logan in which Logan acknowledged that the fire "went through" him. Logan, an admitted alcoholic, was easily manipulated by Evans' statements into providing cover for Evans. Kumar moved to exclude the tapes on the basis that Logan was not subject to cross-examination. The trial court agreed and the jury was provided with redacted versions of the tapes. The jury was also instructed that the tapes could be considered as evidence only against Logan, although there remains substantial doubt as to whether juries actually comply with such admonitions.

In return for Evans' falsehoods and self-serving statements, the ATF provided Evans with food, lodging and cash in a total amount of $10,179.79 from February 1996 to December 1996. Of this amount, approximately $3,000 was in the form of cash that Evans was free to spend on

anything he desired without the requirement of providing the ATF with a receipt. Evans received an additional benefit in that he was not served with an arrest warrant issued by a Tennessee state court for his non-payment of approximately $10,000 in child support. Even more importantly, at least to Evans, he was no longer considered a suspect and there is no plan to prosecute him for the lies he admitted telling the ATF during sworn statements taken in the investigation and in false testimony given in front of Magistrate Judge John Dixon.

In its closing, the United States argued that there were three pieces of evidence that demonstrated that Kumar was involved in the alleged conspiracy to destroy the hotel by means of fire. First, the United States argued that Kumar was a participant in the January 2 discussion alleged to have taken place between Sharma and Logan, in which Sharma is to have offered Logan $3,500 to set a fire in the hotel. The second piece of evidence that the United States claimed tied Kumar to the alleged conspiracy was a phone call to the hotel that originated from the Kumar residence on 4:11 p.m. on January 4. The United States alleged that Sharma called Evans at that time and asked to speak to Logan about the plans for the fire. Finally, the prosecution argued that a series of fires at the Travelodge hotel indicated that Kumar had a practice of renovating his hotels by means of insurance proceeds from intentionally set fires.

In response, Kumar argued that the prosecution had failed to produce any testimony that could establish that Kumar was on the phone with Sharma at the time of the alleged offer to Logan. In particular, it was noted that neither Logan nor Evans had any first hand knowledge that Kumar was on the phone with Sharma. Furthermore, the person that allegedly told Logan that Kumar was on the phone with Sharma before Logan entered Sharma's

office admitted that she did not have any personal knowledge of who was actually on the line with Sharma.[2]

As for the second element of the prosecution's case, Kumar noted that there was no evidence that the 4:11 p.m. telephone call from his residence to the hotel was the one described by Evans in his testimony. For example, Evans stated that he spoke to Sharma "late that evening", but the phone record pertained to a call that originated at 4:11 p.m. and lasted only six minutes. More importantly, however, there was absolutely no testimony to indicate that the 4:11 p.m. call was actually transferred to Evans' room, that Kumar was home at the time of the call, or even if he was home that he was aware of the alleged purpose of the call.

Kumar's motions for directed verdict of acquittal were overruled. As noted above, the jury returned a verdict of guilty on all counts as to Kumar. Logan was found guilty of the conspiracy and arson counts, but was acquitted of the mail fraud count. The court of appeals affirmed both convictions.

REASONS FOR GRANTING THE PETITION

The two questions presented in this Petition relate to the scope and extent of Congress's power to legislate conduct under the Commerce Clause of the Constitution. This Court discussed the nature and history of the Commerce Clause in *United States* v. *Lopez*, 514 U.S. 549 (1995), with Chief Justice Rehnquist writing for the Court:

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[2] As noted above, Joyce Smith claimed that she heard Janie Rigsby tell Sharma that Kumar was on the phone sometime before Logan entered Sharma's office. Rigsby did not testify, however, and Kumar's objection to Smith's hearsay testimony was overruled.

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See U. S. Const., Art. I, §8. As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory* v. *Ashcroft*, 501 U. S. 452, 458 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Ibid.*

The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U. S. Const., Art. I, §8, cl. 3. The Court, through Chief Justice Marshall, first defined the nature of Congress' commerce power in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189-190 (1824):

> "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

The commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.*, at 196. The *Gibbons* Court, however, acknowledged that limi-

tations on the commerce power are inherent in the very language of the Commerce Clause.

"It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." *Id.*, at 194-195.

For nearly a century thereafter, the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce. See, *e.g.*, *Veazie* v. *Moor*, 14 How. 568, 573-575 (1853) (upholding a state-created steamboat monopoly because it involved regulation of wholly internal commerce); *Kidd* v. *Pearson*, 128 U. S. 1, 17, 20-22 (1888) (upholding a state prohibition on the manufacture of intoxicating liquor because the commerce power "does not comprehend the purely domestic commerce of a State which is carried on between man and man within a State or between different parts of the same State"); see also L. Tribe, American Constitutional Law 306 (2d ed. 1988)....

In 1887, Congress enacted the Interstate Commerce Act, 24 Stat. 379, and in 1890, Congress enacted the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U. S. C. §1 *et seq*. These laws ushered in a new era of federal regulation under the commerce power. When

cases involving these laws first reached this Court, we imported from our negative Commerce Clause cases the approach that Congress could not regulate activities such as "production," "manufacturing," and "mining." See, *e.g., United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not part of it"); *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 304 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it"). Simultaneously, however, the Court held that, where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation. See, *e.g., Houston, E. & W. T. R. Co.* v. *United States*, 234 U. S. 342 (1914) (*Shreveport Rate Cases*).

In *A. L. A. Schecter Poultry Corp.* v. *United States*, 295 U. S. 495, 550 (1935), the Court struck down regulations that fixed the hours and wages of individuals employed by an intrastate business because the activity being regulated related to interstate commerce only indirectly. In doing so, the Court characterized the distinction between direct and indirect effects of intrastate transactions upon interstate commerce as "a fundamental one, essential to the maintenance of our constitutional system." *Id.*, at 548. Activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond Congress' reach. *Id.*, at 546. The justification for this formal distinction was rooted in the fear that otherwise "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government." *Id.*, at 548.

Two years later, in the watershed case of *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), the Court upheld the National Labor Relations Act against

a Commerce Clause challenge, and in the process, departed from the distinction between "direct" and "indirect" effects on interstate commerce. *Id.*, at 36-38 ("The question [of the scope of Congress' power] is necessarily one of degree"). The Court held that intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress' power to regulate. *Id.*, at 37.

. . .

In *Wickard* v. *Filburn*, the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat. 317 U. S., at 128-129. The *Wickard* Court explicitly rejected earlier distinctions between direct and indirect effects on interstate commerce, stating:

> "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' " *Id.*, at 125.

The *Wickard* Court emphasized that although Filburn's own contribution to the demand for wheat may have been trivial by itself, that was not "enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.*, at 127-128.

Jones & Laughlin Steel, *Darby*, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the

way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U. S., at 37. . . .

. . .

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. *Perez* v. *United States*, *supra*, at 150; see also *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, *supra*, at 276-277. First, Congress may regulate the use of the channels of interstate commerce. See, *e.g.*, *Darby*, 312 U. S., at 114; *Heart of Atlanta Motel*, *supra*, at 256 ("'[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.'" (quoting *Caminetti* v. *United States*, 242 U. S. 470, 491 (1917)). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. See, *e.g.*, *Shreveport Rate Cases*, 234 U. S. 342 (1914); *Southern R. Co.* v. *United States*, 222 U. S. 20 (1911) (upholding amend-

ments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez*, *supra*, at 150 ("[F]or example, the destruction of an aircraft (18 U. S. C. §32), or . . . thefts from interstate shipments (18 U. S. C. §659)"). Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, 301 U. S., at 37, *i.e.*, those activities that substantially affect interstate commerce. *Wirtz*, *supra*, at 196, n. 27.

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. Compare *Preseault* v. *ICC*, 494 U. S. 1, 17 (1990), with *Wirtz*, *supra*, at 196, n. 27 (the Court has never declared that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"). We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

Lopez addressed the issue of whether a provision of the Gun-Free School Zones Act of 1990 exceeded the authority of the Congress to legislate under the Commerce Clause. The portion of the Act in question, 18 U.S.C. § 922(q)(1)(A), made it a federal offense to knowingly possess a firearm in a "place that the individual knows, or has reasonable cause to believe, is a school zone." The government contended that the statute was a proper exercise of Congressional power under the Commerce Clause because possession of a firearm on school property increased the likelihood of violent crime, which would affect the national economy in two respects.

The government's first argument was that the substantial costs of violent crime are distributed among the gen-

eral population by means of insurance. The government then argued that violent crime deters individuals from traveling to areas that are perceived to be unsafe. *Id.* at 564. This Court properly determined that the conduct prohibited by 18 U.S.C. § 922(q)(1)(A) did not substantially affect interstate commerce, noting:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. See supra, at 1629. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. *Gibbons v. Ogden, supra,* at 195, and that there never will be a distinction between what is truly national and what is truly local, cf. *Jones & Laughlin Steel, supra,* at 30, 57 S.Ct., at 621. This we are unwilling to do.
>
> *Id.* at 567-68.

In this case, Defendant Kumar argued to the court of appeals that the government had failed to produce evidence beyond a reasonable doubt that the hotel in question had a substantial affect on interstate commerce. Defendant Kumar noted that the government called as witnesses three hotel guests during its case in chief: Michael Price, Michael McClain, and Victoria Sousa. All three lived in Kentucky at the time that they stayed at the hotel, so the government failed to satisfy the jurisdictional requirement of 18 U.S.C. § 844(i).

The court of appeals rejected Defendant Kumar's argument on the basis that the government was required to

show only "that the building in question has some relationship to an activity of a commercial nature . . . [and] establish a minimal connection between the property and some aspect in interstate commerce." 1999 WL 551353, * 20. (38a). The court of appeals concluded that the government satisfied that minimal requirement by demonstrating that some unspecified guests of the hotel traveled in interstate commerce, that the hotel was covered by an insurance policy issued by an out-of-state insurance company, that the hotel had a franchise agreement with an out-of-state franchisor which resulted in regular mail and telephone communication. *Id.*

Defendant Kumar respectfully submits that the approach taken by the court of appeals is indistinguishable from the approach rejected by this Court in *Lopez, supra,* and that this Court should grant this Petition so as to establish whether 18 U.S.C. § 844(i) exceeds Congress' power to legislate under the Commerce Clause, and if not, the circumstances under which the application of the statute to particular facts may be constitutional.

Defendant Kumar also wishes to point out that this Court entered an order on November 15, 1999 in the case of *Dewey J. Jones* v. *United States,* Docket No. 99-5739, which granted a petition for a writ of certiorari on the following question: "Whether, in light of *United States* v. *Lopez,* 514 U.S. 549 (1995), and the interpretative rule that constitutionally doubtful constructions should be avoided, see *DeBartolo Corp.* v. *Florida Gulf Coast Trades Council,* 485 U.S. 568, 575 (1988), Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional."

The present case has a number of similarities to the *Jones* case. For example, in the *Jones* case, the Seventh Circuit seized upon the possible cost to insurers, at least

some of which would be from different states from the insured, in order to conclude that the destruction of a private residence had a substantial affect on interstate commerce. The court of appeals adopted a similar approach below, suggesting that more than one circuit has failed to interpret this Court's holding in *Lopez* correctly.

The unconstitutional application of 28 U.S.C. § 844(i) to the facts presented in this case, and the arson and conspiracy charges resulting therefrom, resulted in extreme prejudice to the Defendant. As noted above, Defendant Kumar is currently serving a term of life imprisonment in the federal penitentiary. Had the arson and conspiracy charges been brought in state court, Defendant would have been charged with — at worst — Murder in the First Degree, KRS 507.020(1)(b)[3], but he would have had the possibility of receiving a sentence that included the possibility of parole. That sentence was not available to the Defendant due to the application of the sentencing guidelines. Of course, it is also possible that the Defendant might have been convicted on a lesser offense, such as Arson in the First Degree, KRS 513.030, which is punishable by a sentence of not less than 20 years, and no more than 50 years or for life.

In sum, the present case involves the very concerns voiced by the majority of this Court in *Lopez* regarding the constitutional distinction between "what is truly national and what is truly local." Because the court of appeals

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[3] KRS 507.020(1) provides, in part: "A person is guilty of murder when: (b)including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person."

failed to properly limit the intrusion of federal power into a matter that is truly local, this Court's review is warranted.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

NOT RECOMMENDED FOR PUBLICATION
DATED AND FILED JULY 19, 1999

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 97-5912; 97-5914

UNITED STATES OF AMERICA, - *Plaintiff-Appellee,*

v.

JOE A. LOGAN, SR. and SURESH KUMAR a/k/a SAM KUMAR, - *Defendants-Appellants.*

Appeal from the United States District Court for the Western District of Kentucky

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OPINION—Dated and Filed July 19, 1999

BEFORE: GUY, COLE, and CLAY, Circuit Judges.

CLAY, Circuit Judge. Defendants Joe A. Logan, Sr. and Suresh "Sam" Kumar appeal an order entered by the district court on July 7, 1997, sentencing them to life imprisonment for their convictions for conspiracy to destroy a building by means of arson in violation of 18 U.S.C. § 371 (1994), arson resulting in death and injuries in violation of 18 U.S.C. §§ 2 & 844(i)(1994), and in Kumar's case, mail fraud in violation of 18 U .S.C. § 1341 (1994), in connection with the arson of a Howard Johnson hotel in Bowling Green, Kentucky that resulted in four deaths and injuries to fifteen others. For the reasons set forth below, we AFFIRM the judgment of the district court.

I.

A.

In March 1995, Suresh "Sam" Kumar formed SMD Corporation ("SMD") for the purpose of purchasing the Howard

Johnson hotel in Bowling Green, Kentucky. SMD purchased the Howard Johnson for $960,000, and pursuant to its license agreement, had ninety days to make $431,000 in improvements to bring the hotel up to quality assurance standards. However, the hotel suffered financial problems stemming in part from the fact that it was not strategically located near an interstate, and traffic seldom flowed by the hotel. By May 1995, SMD was undercapitalized, and the Howard Johnson was listed for sale. The hotel failed inspections in August and November 1995, receiving one of the five lowest scores in franchise history.

On January 2, 1996, the front desk clerk at the Howard Johnson patched a call through from Kumar to his brother-in-law, Devinda "Dave" Sharma. Upon receipt of Kumar's call, Sharma motioned for hotel housekeepers Joyce Smith and Leanne Bradley to leave his office. Sharma invited Joe S. Logan, Sr., a hotel maintenance employee, into his office. While Logan sat in Sharma's office, Sharma conversed with Kumar briefly on the telephone in their native language of Hindi. Sharma then laid the telephone receiver on the desk, so as to permit Kumar to hear his conversation with Logan, and offered Logan money to set a small fire in the hotel.

Immediately after leaving Sharma's office, Logan conversed with Earnest Evans, another hotel maintenance employee, and told him of Sharma and Kumar's offer to set fire to the hotel. Logan told Evans that Sharma and Kumar initially offered him $2,500 to set the fire, but that they later increased the offer to $3,500 along with a free place to live for one year. Logan asked Evans whether Sharma and Kumar would actually pay him if he set the fire. Evans later told Kay Carter, the hotel's banquet manager, and his girlfriend of Sharma and Kumar's offer to Logan to set a fire in the hotel.

On January 4, 1996, Sharma telephoned Logan. Evans answered the telephone, and passed the receiver to Logan. Evans overheard Logan tell Sharma, "[e]verything is planned as usual[,]" and then saw Logan hang up the

phone.[1] (J.A. at 1448.) The following day, Logan told Evans that the fire at the hotel was to occur during the upcoming weekend. Evans told Kay Carter what he learned, and she told her immediate supervisor, Steve Hooks. Just two days later, in the early morning hours of January 6, 1996, the Bowling Green fire department received an alarm that the Howard Johnson was afire. Firefighters arrived on the scene three minutes after receiving the alarm and observed a massive fire on the second floor of the hotel. By the time the fire had been extinguished, the hotel had been destroyed, four people had died, and fifteen people had been injured. Kumar, doing business as SMD, filed an insurance claim in excess of $4.5 million in losses as a result of the fire.

The Alcohol, Tobacco, and Firearms ("ATF") response team concluded that the fire was caused by arson. A few days after the fire, Logan admitted to Evans that he had set the fire. Evans informed the ATF. Soon thereafter, on behalf of the government, Evans began to secretly record conversations that he had with Logan. When authorities arrested Logan on June 25, 1996, Logan told ATF agents that although Sharma had offered him money to set fire to the hotel, he did not set the fire. As ATF agents investigated the Howard Johnson fire, they learned that Kumar had been involved in prior hotel fires and insurance claims relating to his ownership and operation from fall 1993 through fall 1996 of a hotel in Nashville, Tennessee licensed under the name Travelodge.[2]

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[1]Sharma allegedly made the telephone call to Logan from Kumar's residence. Telephone records submitted at trial indicate that there were phone calls placed at 4:07 p.m. and 4:11 p.m. from Kumar's residence to the Howard Johnson. Evans testified at trial that the telephone call occurred during the early evening hours.

[2]The hotel was franchised under the name of Travelodge until September 1995, and later operated as a non-franchised hotel known as "Oxford Inns of America." (J.A. at 1833.)

As part of the franchise agreement with Forte Hotels, the owner of the Travelodge name, Kumar was required to upgrade the hotel as set forth in a schedule otherwise known as a "punch list." A "punch list" ensures that a hotel owner will operate the hotel according to Travelodge standards Kumar's hotel property declined significantly since its first inspection in February 1994, and in October 1994, within one year of becoming a Travelodge, the hotel failed inspection because it was in very poor condition. After the property again failed inspection on May 24, 1995, Forte Hotels sent Kumar a notice of default on July 10, 1995, advising him that if he did not bring the hotel up to Travelodge standards, it would terminate the franchise agreement. Although Kumar represented to Forte Hotels that he had purchased items to renovate the hotel, Forte Hotels again determined by August 1995 that the hotel was in poor condition, terminated the license agreement, and instructed Kumar to take the Travelodge sign down within fifteen days and to pay liquidated damages in the amount of $45,000 Kumar nevertheless kept the sign up after expiration of the fifteen day period.

Agents discovered that between February and December 1995, Kumar filed four separate insurance claims relating to five fires at the Travelodge hotel in Nashville. The first fire occurred on February 13, 1995 in Room 214. The investigation revealed that at the time of the fire no hotel guest had rented Room 214, and the door to the room was locked. The fire investigator could not determine the cause of the fire because Kumar had instructed hotel employees to clean debris from the room prior to the investigator's arrival. Although Kumar paid hotel employees to repair the damage to Room 214, he told to the insurance company that a contractor had performed the work and thereby received $5,800 on his insurance claim, instead of the $4,800 he was otherwise due.[3]

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[3]Insurance companies pay more on claims when the work is performed by a licensed contractor, as opposed to an unlicensed laborer. Contractors typically charge twenty percent more than the cost of raw materials to compensate themselves for their overhead and profit.

The Travelodge in Nashville experienced two more fires in the late evening and early morning of May 10 and 11, 1995. After the fire department put out the first fire in Room 316, employees and guests on the third floor were relocated to the second floor. About thirty minutes after the fire in Room 316 was extinguished, another fire erupted in Room 312. The fire investigator determined that both were arson fires set in mattresses by someone who had keys to the room, and found that there were no hotel guests renting Room 312 or 316. The next day, Kumar told fire investigators that Tara Clark, a housekeeper who lived on the premises, had seen a woman named Lisa Duke run from the fire scene of Room 316. Duke was later charged and prosecuted for arson. Although Clark testified in court that she witnessed Duke fleeing from the scene of the fire, Clark later told authorities that Kumar had instructed her to give false testimony. The court dismissed the case against Duke for insufficient evidence. Once again, although hotel employees repaired the damage to Rooms 316 and 312. Kumar told the insurance company that a contractor would perform the work and thereby received $21,024 on his insurance claim, about $4,000 more than he was otherwise entitled to.

A few weeks later, on May 29, 1995, there was a fire in Room 301 of the Travelodge. The investigator determined that the fire in Room 301, which was unoccupied by guests, was set in a mattress and was also the result of arson. Kumar subsequently fired several employees whom he claimed to have believed had set the fires. Kumar told the investigator that the employees he fired were now employed across the street at the Knights Inn hotel. Although Kumar stated that he did not notify the Knight's Inn owner of his suspicions because he did not know the owner, the Knights Inn owner was in fact a friend of his. Another Travelodge fire took place in Room 211 in the early morning hours of November 5, 1995. This room was occupied by two patrons, Stacy Eubanks and Terrance Robinson, who attended a Tennessee State football homecoming game to

return and find that there had been a fire in their room. Although Kumar initially accused them of setting fire to the room, he recanted his statement the next day. Kumar later told a franchise salesperson that he had caught the general manager setting fires and that the problem was solved.

The next day, November 6, 1996, having lost his Travelodge franchise, Kumar signed a franchise application with Park Inn International for the same property. Park Inn outlined $237,100 in hotel renovations that Kumar needed to complete in order to affiliate with Park Inn. The contractor Kumar hired to repair the second floor estimated damages at $156,953.94. After the contractor began making the necessary repairs, Kumar withheld payment for completed work until the contractor would submit a supplemental estimate to the insurance company for repairs to the first and third floors of the hotel. Kumar paid the contractor $106,000 for his services only after the contractor drew up a false estimate approximating additional damages at $198,000.

A few weeks after the fire in Room 211, Kumar asked a former employee to set fire in the laundry room to "smoke up" the wires in the phone system. The phone system at Kumar's hotel frequently did not work properly. The employee feigned agreement to set the fire so that Kumar would leave him alone. Within months, Kumar told the insurance company that smoke had caused damage to the hotel's phone system. Upon investigation in response to Kumar's report, the insurance company found no evidence of a fire.

B.

On July 1, 1996, a federal grand jury returned an indictment charging Logan, Kumar, and Sharma in three counts with conspiracy to commit arson in violation of 18 U.S.C. § 371, arson resulting in death and injuries in violation of 18 U.S.C. §§ 2 & 844(i), and mail fraud in violation of 18 U.S.C. § 1341. Arrest warrants were issued for

Kumar and Logan, and both were taken into custody.[4] Kumar and Logan entered pleas of not guilty. Kumar, who was denied bond and stayed in custody pending trial, moved for a speedy trial and for a separate trial on July 24, 1996. The district court denied Kumar's motion for severance, and scheduled trial for September 30, 1996.

On September 10, 1996, Logan advised the trial court that he intended to introduce evidence of his mental condition and filed a motion to continue the trial. Kumar renewed his motion for separate trials on September 13, 1996, and also moved to suppress evidence of the Travelodge fires and of prior insurance claims he had filed. The district court denied Kumar's motion to suppress on September 19, 1996. The next day, the court denied Kumar's motion for severance and, over Kumar's objection, granted Logan's motion for a continuance, scheduling trial for January 6, 1997. On November 26, 1996. Kumar renewed his motion to sever. The court again denied his request.

Trial commenced on January 6, 1998. The prosecution theory was that Kumar, mirroring his practices at the Travelodge, hired as hotel employees persons who were "down on their luck," particularly individuals who did not have a place to live. Because they lived in the hotel as part of their compensation, Kumar could manipulate these employees to set fires, or they would be back on the street. According to the government, Kumar wished to set fire to the hotels to obtain insurance money he could use to renovate the hotels to comply with franchise requirements. The government presented three pieces of evidence to show that Kumar conspired to destroy the Howard Johnson by means of fire. First, Kumar participated in a discussion on January 2, 1996 between Sharma and Logan, in which Sharma offered Logan $3,500 to set fire to the hotel. Second, on

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[4]Although an arrest warrant was issued for Sharma's arrest, the warrant was never executed because Sharma had already returned to India.

January 4, 1996, a call to the hotel in which Sharma spoke with Logan about the arson plans originated from Kumar's residence. Third, the fires at the Travelodge hotel indicated that Kumar had a scheme of renovating his hotels by means of insurance proceeds from intentionally set fires. As for Logan, the government argued that Logan set the fire in exchange for money and board from Sharma and Kumar.[5]

After seven and one-half weeks of trial, on February 28, 1997, the jury convicted Kumar and Logan on all counts. Kumar filed a motion for judgment notwithstanding the verdict and motion for a new trial on March 5, 1997. The district court denied Kumar's post-trial motions on May 14, 1997. On July 9, 1997, the district court sentenced both Defendants to life imprisonment and five year terms of supervised release.[6] Both filed timely notices of appeal to this Court on July 18, 1997.

II.

A. LOGAN

On appeal, Logan raises numerous claims of error. Specifically, he challenges (1) rulings of the district court resulting in the exclusion of certain evidence; (2) the court's denial of his motion for a continuance to prepare for or to bar the testimony of the prosecution's rebuttal expert; (3) the government's offer of financial assistance to a witness; (4) the district court's rulings on the admissibility of polygraph evidence; (5) the district court's jury instruction on

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[5]In defense, Logan blamed Evans for setting the fire. He presented evidence showing that he is a severe alcoholic who suffers from alcohol-induced dementia and related mental deficits which affect his reasoning and ability to understand and communicate. He also claimed that ATF agents exploited his diminished capacity during questioning and elicited involuntary or coerced statements.

[6]Kumar was sentenced to life imprisonment for both the arson and conspiracy charges, and five years imprisonment for the mail fraud charge, with sentences running concurrently.

conspirator liability; (6) the district court's denial of his motion to suppress self-incriminating statements; (7) the allowance by the district court of live victim impact statements; and (8) the propriety of his sentence. We address Logan's claims below.

1. Evidentiary Issues

Logan first contends that the district court erred in excluding testimony from Evans' relatives regarding Evans' history of setting fires extending as far back as 1973. Logan claims that such evidence was admissible to show bias and a common scheme under Fed.R.Evid. 404(b). The district court ruled that evidence of Evans' involvement in prior fires was inadmissible, since the probative value of the evidence was substantially outweighed by "the danger of unfair prejudice, confusion of the issues or misleading the jury" (J A at 1354-57, 1368-73.) Logan maintains on appeal that the district court's failure to admit evidence of Evans' arson history permitted Evan's perjury-his testimony that Logan started the fire-to go unchallenged. We disagree.

Generally, this Court reviews evidentiary rulings and a district court's decision to limit the cross-examination of a witness for an abuse of discretion *See United States* v. *Hickey,* 917 F 2d 901, 904 (6th Cir.1996), *Dorsey* v. *Parke,* 872 F.2d 163, 166-67 (6th Cir.1989). We have recognized that the bounds of the trial court's discretion are exceeded when the defense is not allowed to "plac[e] before the jury facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred[.]" *United States* v. *Garrett,* 542 F.2d 23, 25 (6th Cir.1976). Notably, where a defendant claims a violation of his Sixth Amendment right to confrontation, this Court reviews the claim de novo. *See United States* v. *Meyer,* 803 F.2d 246, 249 (6th Cir.1986).

At the outset, we reject Logan's contention that his Sixth Amendment right to confrontation was violated when the district court excluded evidence of Evans' alleged arsons. We observe that the district court permitted Logan to cross-examine Evans with respect to his involvement in

prior arsons, even those not resulting in conviction. Although the court originally restricted Evans' testimony, it changed its ruling to permit cross-examination of Evans concerning the alleged arsons when Evans, during cross-examination, testified that he had lied to ATF agents because he was scared of "[his] background of going to jail," particularly since he had been charged with arson. Because it would go to Evans' credibility,[7] the trial court thereafter allowed Logan's counsel to question Evans about a fire in which he was convicted for arson, and three other fires not resulting in conviction a fire at his mother's house, a fire to his home in 1973, and a fire to his truck in 1987. We therefore conclude that the district court did not violate Logan's Sixth Amendment right to confrontation, as Logan was allowed to cross-examine Evans about prior fires.

Moreover, we find no error in the district court's decision, after hearing avowal testimony from Evans' ex-wife, son, and sister, to deem inadmissible extrinsic evidence of Evans' alleged prior arsons. Although Logan claims that extrinsic evidence of the fires would have shown that Evans had a motive and common plan for setting fires to collect insurance premiums, we observe that the only instance in which Evans could have recovered insurance premiums was for the 1973 house fire, and Logan did not show that Evans stood to benefit from the insurance claim for the Howard Johnson fire. We therefore believe the district court properly denied Logan's claim to present extrinsic evidence of Evans' alleged involvement in past fires. Even if the

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[7]Rule 608(b) of the Federal Rules of Evidence provides, in relevant part, that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crimes provided in Rule 609, may not be proved by extrinsic evidence" Fed.R.Evid. 608(b) (1994). However, pursuant to the discretion of the court, specific acts may be inquired into on cross-examination of a witness if such evidence is "probative of truthfulness or untruthfulness." *Id.*

court erred by failing to admit extrinsic evidence of Evans' alleged arson history, such error was harmless since, as previously stated, Logan was able to cross-examine Evans extensively about his background involvement with fires. Thus, any error attending the district court's failure to admit extrinsic acts evidence regarding Evans did not prejudice Logan, since Logan sufficiently attacked Evans' credibility at trial.

Logan further claims that he was denied a fair trial and due process in violation of the Fifth and Sixth Amendments when the district court did not allow Steve Hooks to testify that Evans had used the word "nigger." Although the district court allowed Logan to elicit testimony from Hooks that Evans told Hooks that he had killed a black man that he found in bed with his wife, Logan asserts that the district court should have further allowed testimony that Evans used the word "nigger" when describing the incident. Logan alleges that Evans' use of the word "nigger" is relevant to show Evans' prejudice toward African-Americans and a motive to frame Joe Logan, "the slow witted black janitor at the hotel" (D. Br. at 34.) We are not persuaded by Logan's argument.

At Logan's request, the district court ruled that the defense could ask Hooks about a story Evans allegedly told Hooks about shooting a black man he found in bed with his wife. The district court admitted the testimony for purposes of establishing Kumar's relationship with Evans, as Evans had claimed that he was in a type of work release program under Kumar's supervision. However, the court limited Hooks' testimony to exclude the racial epithet "nigger," finding in relevant part:

> [the racial epithet] has little, if any, probative value and [its] prejudicial effect greatly outweighs that. This alleged racial epithet was not directed towards Mr. Logan. There's not enough indicia from the statement and the circumstances involved to indicate a broad bias against African Americans or particularly Mr. Logan in this case because he is an African American[.]

(J A at 1928-29) Hooks consequently then testified before the jury that the evening before the fire, Evans told him that Kumar had, among other things, kept him from going to prison for life after he shot a black man he caught in bed with his wife.

Upon examination of the record, we agree with the district court that testimony regarding Evans' use of a racial epithet had little relevance, and would have unduly inflamed the jury against Evans Contrary to Logan's assertion, evidence of Evans' use of the word "nigger" was not relevant to put in context the whole conversation he had with Hooks. In fact, during his avowal testimony, Hooks stated that Evans had never, before that occasion, said anything derogatory about blacks while in his presence. Here, evidence that Evans described the man in bed with his wife as a "nigger" was only minimally probative as to his attitude towards all African Americans. Therefore, the district court did not abuse its discretion by denying admission of Evans' use of a racial epithet, as the evidence was only slightly probative but very prejudicial.

2. Rebuttal Testimony of Government Witness

Logan next assigns error to the district court's decision to allow the government's rebuttal witness to testify when the government did not give the defense pretrial notice that the expert would testify, or a report summarizing the expert's testimony. Logan submits that the district court's failure to bar the expert's testimony, or, in the alternative, to grant him a continuance before cross-examination of the expert, violated his right to due process under the Fifth and Sixth Amendments. We review the denial of a motion for continuance for an abuse of discretion. *See United States* v. *Sawyers*, 902 F.2d 1217, 1219 (6th Cir.1990). Similarly, the decision to admit expert testimony "has been traditionally left to the sound discretion of the trial court" and must be sustained "unless manifestly erroneous" Id. (quoting *United States* v. *Green*, 548 F.2d 1261, 1268 (6th Cir.1977)).

Logan's objection stems from the following events. On September 10, 1996, prior to trial, Logan notified the court

of his intent to introduce expert testimony of his mental condition. The government obtained a court order directing that Logan's expert provide "all test instruments and test results" relating to the examination of Logan to Dr Daniel Martell on behalf of the government. The government did not, at any time prior to trial, notify Logan of its intent to call Dr. Martell as an expert witness, or provide Logan with a summary of intended testimony. Six weeks into trial, the government asked the district court to allow Dr. Martell to interview Logan. In light of the potential prejudice to Logan's defense, the court denied the government's request. After testimony from Logan's experts, the government announced that Dr. Martell would testify in rebuttal. Logan requested a summary of Dr. Martell's testimony on the grounds that Rule 16 of the Federal Rules of Criminal Procedure required such disclosure of an expert's testimony. The district court denied Logan's request for a summary, finding that Rule 16 only required disclosure as to witnesses called by the government during its case-in-chief. Although Logan moved to bar Dr. Martell's testimony or for a continuance to allow more time to prepare to cross-examine Dr. Martell, the district court denied Logan's motion. Dr. Martell testified that Logan was faking his poor psychological condition, and that, as a result, the psychological tests performed by Logan's experts were invalid.

Logan argues that even before the 1997 amendments,[8] Rule 16 required pretrial disclosure to guard against sur-

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[8]The 1997 amendment to Rule 16 provides:

> (E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use during its case-in-chief at trial. If the government request discovery under subdivision(b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a

(footnote continued on following page.)

prise resulting from unexpected expert testimony, and promoted fairness by giving the defense a fair opportunity to test the merits of the government's expert's testimony. Prior to the 1997 amendments, Rule 16 provided for discovery of an expert witness, his report, and a summary of his expected testimony only if the government intended to call the expert in its "case-in-chief" Fed.R.Crim.P. 16(a)(1)(E)(1994). Courts have strictly restricted discovery in criminal cases to that allowed by the express provisions of Rule 16. *See United States* v. *Presser*, 844 F.2d 1275, 1285 (6th Cir.1988). Indeed, a district court has no authority to order discovery beyond that set forth in Rule 16. See id. Although Logan correctly identifies the policy rationale for Rule 16, the Rule 16 in effect at the time of his trial only mandated such discovery when the government introduced a witness as part of its "case-in-chief." Because Logan was entitled neither to discovery of a rebuttal witness nor a summary of the rebuttal witness' expected testimony, the district court did not abuse its discretion in denying his requests to bar the rebuttal expert and for a continuance.

(footnote continued)

> written summary of the testimony the government intends to use . . . at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

Fed.R.Crim.P. 16(a)(1)(E) (1998). The above amendment thus created a parallel reciprocal disclosure requirement. While Logan acknowledges that the 1997 amendment addresses the situation here by requiring disclosure of expert witnesses the government intends to call in rebuttal, the 1997 amendments to the Federal Rules of Criminal Procedure are irrelevant for purposes of this appeal, as they did not become effective until six months after Logan's trial.

Although Logan asserts that he was denied due process of law, he cites no support for his proposition that due process requires discovery of an expert rebuttal witness or submission of a summary report to the defense. In fact, in Presser, this Court stated that "[t]here is no general constitutional right to discovery in a criminal case[.]" 844 F.2d at 1281. While the district court's decision to deny Logan a continuance might have impeded his ability to prepare for trial, we are not persuaded that Logan was unduly prejudiced, as the scope of his cross-examination of the government's witness was not directly curtailed. See Bonds, 12 F.3d at 554 (finding that errors that do not affect substantial rights are harmless and do not entitle a defendant to a new trial). Moreover, the government's witness only critiqued tests performed by Logan's experts, evidence with which the defense was familiar. Therefore, we find no error in the district court's decision to deny Logan's motion to bar testimony from the government's rebuttal witness and or to continue the trial.

3. Government Offer of Financial Assistance to Evans

Logan complains that the government violated 18 U.S.C. § 201(c)(2) when it provided Evans compensation for his testimony. That statute holds criminally liable one who "directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . . authorized by the laws of the United States to hear evidence or take testimony. . . ." 18 U.S.C. § 201(c)(2) (1994). Specifically, Logan takes issue with the government's payment to Logan of approximately $10,000 when "the undercover rationale no longer existed" (D. Br. at 26.) The government states that it compensated Evans for making undercover tapes on its behalf, and provided Evans with financial assistance for housing, meals, gasoline, and other incidentals once Kumar was arrested, as Evans no longer had a job. Logan asserts that the government committed bribery in violation of § 201(c)(2) in the

sense that it offered financial inducements to Evans in order to obtain favorable testimony from him. Since Logan did not seek suppression of Evans' testimony based on an alleged violation of 18 U.S.C. § 201(c)(2), we review his claim for plain error. Fed.R.Crim.P. 52(b).

We find no plain error here Logan's claim for relief is premised upon the decision in *United States* v. *Singleton*, 144 F.3d 1343 (10th Cir.1998), in which a panel of the Tenth Circuit interpreted § 201(c)(2) to prohibit prosecutors from offering leniency to the accomplice of a defendant in exchange for truthful testimony. See id. at 1351. However, the Tenth Circuit, sitting en banc, vacated that decision to instead hold that § 201(c)(2) does not apply to the government or a federal prosecutor functioning within the official scope of the office. *See United States* v. *Singleton*, 165 F.3d 1297, 1298 (10th Cir.1999) (en banc). Significantly, in *United States* v. *Ware*, 161 F.3d 414 (6th Cir.1998), we also rejected the rationale that § 201(c)(2) applies to the government. We therefore reject Logan's claim that the prosecution violated § 201(c)(2) when they, functioning within the scope of office, offered limited financial assistance to a government witness.

4. Evidence of Polygraph Examinations

Logan next argues that the admission of witness Steve Hooks' failure of a polygraph examination violated his rights to a fair trial and due process in violation of the Fifth and Sixth Amendments. He maintains that the polygraph evidence had minimal probative value, but substantial prejudicial effect. Logan further asserts that once the district court allowed evidence that Hooks failed a polygraph examination, it should have admitted testimony that Logan agreed to take a polygraph. We believe these contentions lack merit.

We review a district court's decision to allow polygraph evidence for an abuse of discretion. *See United States* v. *Sherlin*, 67 F.3d 1208, 1216 (6th Cir.1995). Generally, "the results of a polygraph examination are inadmissible." *Sherlin*, 67 F.3d at 1216. However, this Court has estab-

lished a two-step analysis for determining when the results of a polygraph examination should be admitted at trial over an opponent's objections. *See id.* Polygraph evidence is admissible if it is relevant and if its probative value outweighs the risk of prejudice. See id.

Kumar called Hooks as a witness and elicited testimony that ATF agents questioned Hooks on two separate occasions for approximately twelve hours. The government objected to questions pertaining to the length of Hooks' interview by the agents, as the length of the interview was due in part to the fact that Hooks failed a polygraph examination. The district court advised Defendants' counsel, "[y]ou better leave it alone." (J.A. at 1901.) Despite the district court's admonition, Kumar and Logan, on direct and redirect examination, questioned Hooks about the length of Hooks' interview, and elicited testimony that the agents told Hooks that he was lying. Before re-cross, the government sought permission from the court to ask Hooks about the polygraph examination. The district court granted the government's request and instructed the jury that it could consider the polygraph results to the extent it would bear on the nature of Hooks' interview by ATF agents, but that the polygraph evidence should not be used as any indication of Hooks' credibility. The government asked Hooks whether the agents informed him that he failed a polygraph examination, and accused him of lying only in response to the fact that he failed the polygraph examination.

The district court did not abuse its discretion in admitting this evidence. The polygraph evidence was probative as to the reasons why the ATF agents interviewed Hooks at length and accused him of falsifying his statements. Significantly, it was Kumar and Logan who made the length of the ATF interview an issue. Although the court warned defense counsel not to pursue questioning regarding the length of Hooks' interview, or the fact that agents called him a liar, counsel for both Defendants questioned Hooks extensively about these issues. Defendants therefore

"opened the door" to admission of the polygraph evidence Moreover, the district court gave a limiting instruction to the jury to minimize the risk of prejudice to the defense. Under these circumstances, we find no abuse of discretion in district court's decision to allow evidence of Hooks' failed polygraph evidence.

Finally, we find no merit in Logan's claim that the district court should then have admitted evidence, presumably to bolster his own credibility, that he offered to take a polygraph examination. While a district court, in limited circumstances, has discretion to admit evidence of a party's willingness to take a polygraph examination, see *United States* v. *Scarborough*, 43 F.3d 1021, 1026 (6th Cir.1994), the court is not obligated to deviate from the general rule that polygraph evidence is inadmissible. We therefore conclude that the district court did not abuse its discretion in denying Logan's request to admit evidence that he agreed to take a polygraph exam.

5. Jury Instructions

Logan further challenges the district court's decision to instruct the jury with regard to criminal liability for the acts of co-conspirators, otherwise known as Pinkerton liability, on the grounds that the Pinkerton instruction confused the jury. As we have noted, "[t]he standard of review for jury instructions is that they are reviewed as a whole to determine whether they adequately inform the jury of relevant considerations and provide a basis in law for the jury to reach its decision." *Innes* v. *Howell Corp.*, 76 F.3d 702, 714 (6th Cir.1996). "The district court may be reversed only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." Id. Thus, this court reviews jury instructions for legal error, considering the jury charge as a whole. *See United States* v. *Newcomb*, 6 F.3d 1129, 1132 (6th Cir.1993). Our review of Logan's challenge leads us to conclude that it is without merit.

It is well settled under the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), that a conspirator may be convicted for offenses committed by other conspirators

during and in furtherance of the conspiracy. *See id.* at 646-47. Under the *Pinkerton* "vicarious liability" rule, the substantive offense must be in furtherance of the conspiracy and must be reasonably foreseeable. *See Id.* Hence, the Pinkerton rule allows a party to a continuing conspiracy to be held responsible for the reasonably foreseeable act of a co-conspirator "when the substantive offense is committed by one of the conspirators in furtherance of the [conspiracy]." *Id.* at 647. Here, the district court instructed the jury that members of a conspiracy are liable for the acts of co-conspirators, and that the jury could find a defendant guilty of a substantive offense if it found that the offense was committed by a conspirator in furtherance of the conspiracy and that the act was reasonably foreseeable. While Logan does not allege that the district court's *Pinkerton* instruction was an incorrect statement of the law, he claims that the instruction confused the jury, that there was insufficient evidence to support the instruction, and that withdrawal from a conspiracy relieves a defendant of liability for acts performed in furtherance of the conspiracy. We are unpersuaded for three reasons.

First, although Logan claims that the *Pinkerton* instruction confused the jury, he points to nothing in the instruction which could have confused the jury. Logan asserts that the jury's question-asking whether the person who set the fire would have to be part of the conspiracy-shows that the jury was confused. However, the jury question actually concerned whether a defendant can be found guilty of Count 2, the substantive arson count, if the person who actually set the fire, though a co-conspirator, was unknown to other co- conspirators. The question merely sought an explanation of the court's instructions, and the district court offered such clarification and cured any alleged confusion by issuing a supplemental instruction.

Second, contrary to Logan's assertion, the record reveals that there was sufficient evidence to support the *Pinkerton* instruction. Logan contends that while the evidence shows that he knew of the conspiracy, it does not

show that the became a part of the conspiracy. However, viewing the evidence in the light most favorable to the prosecution, we find that there is sufficient evidence to infer that Logan was a conspirator. Specifically, the evidence showed that (1) Logan admitted to Evans that Kumar and Sharma offered him money to set fire to the hotel; (2) Evans overheard Logan tell Sharma during a telephone call that everything was planned; and (3) after the fire, Logan told Evans that he had set the fire. Additionally, Evans overheard Kumar tell Logan that he would pay Logan after he received the proceeds of his insurance claim. Given the cumulative effect of this evidence, the jury could reasonably have concluded that Logan was a participant in the conspiracy.

Third, although Logan notes that a person who has withdrawn from a conspiracy is no longer liable for the acts performed in furtherance of the conspiracy, at trial he never offered the defense of withdrawal or tendered a withdrawal instruction. *See United States* v. *Hayter Oil Co., Inc.*, 51 F.3d 1265, 1271 (6th Cir.1995) (stating that "[w]ithdrawal is an affirmative defense which must be proven by the defendant"). Moreover, Logan's claim of withdrawal contradicts his position that he never participated in the conspiracy. Accordingly, we conclude that the district court did not err by instructing the jury on *Pinkerton* liability.

6. Motion to Suppress Self-Incriminating Statements

Logan contends that the district court erred when it admitted evidence of Logan's statements to Evans and his statements to ATF agents because these statements were obtained in violation of his right to counsel, due process, and his privilege against compelled self-incrimination. Logan argues that his pre- arrest statements to ATF agents should be suppressed due to his diminished mental capacity resulting in part from his alcoholism. Logan therefore claims that he lacked the requisite capacity to give admissible testimony, and that the ATF exploited his diminished mental capacity in questioning him and thereby elicited involuntary coerced statements. We disagree.

"On suppression issues, we review the [d]istrict [c]ourt's findings of fact for clear error, but we review all conclusions of law de novo." *United States* v. *Crowder*, 62 F.3d 782, 785 (6th Cir.1995). The issue of whether a defendant was "in custody" is a mixture of law and fact, and is thus reviewed de novo. *Thompson* v. *Keohane*, 516 U.S. 99, 100-03 (1995). However, "[t]he district court's findings with regard to voluntariness [of consent to search] will not be reversed unless clearly erroneous." *United States* v. *Taylor*, 956 F.2d 572, 577 (6th Cir.1992).

A person proves that he is in custody, and that he therefore requires *Miranda* protections, if he can show a " 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *United States* v. *Warner*, 971 F.2d 1189-1201-02 (6th Cir.1992). The test is one of objective reasonableness. *See Michigan* v. *Chesternut*, 486 U.S. 567, 574 (1988). "This 'reasonable person" ' standard . . . ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Id.*

The facts relevant to Logan's challenge are as follows. A few days after the fire, Logan told Evans he had set the fire at the Howard Johnson hotel. On March 6, 1996, ATF agents traveled to Kumar's Travelodge in Nashville, and asked Logan if he would agree to an interview. Logan agreed to meet the agents at a nearby hotel. At the outset, an agent advised Logan that he was there because he agreed to the interview, and that he could leave anytime he wanted to leave. At the end of the interview. Logan volunteered to the agents how to contact him in the future. The agents recorded Logan's statements. Logan now argues that he was intoxicated during each conversation that he had with Evans or the ATF agents, and therefore could not have voluntarily, intelligently, or knowingly waived any of his constitutional rights. He maintains that he was therefore in custody when he made statements to law enforcement officers, as he did not believe that he was free to leave. Logan also asserts that the agents did not give him *Miranda* warnings, and that he did not sign a waiver of rights.

Logan filed a motion to suppress his pre- and post-arrest statement to law enforcement officials and to Evans. A magistrate denied Logan's motion to suppress on December 24, 1990, finding, in relevant part, that Logan's statements on March 6, 1996, were voluntary and not made while he was in custody. Critical to the magistrate's conclusion was the fact that Logan was asked to travel to the place of the interview and assented to the request, and there was no evidence in the record indicating that Logan was not free to leave if he so desired. The district court adopted the report and recommendation of the magistrate on January 3, 1997. As for Logan's argument that his testimony is inadmissible due to his diminished mental capacity, the district court noted that "there is substantial evidence on the record which indicates the defendant Logan had the functional mental capacity to give voluntary statements and to waive his *Miranda* rights."

We believe that the government proved by a preponderance of the evidence that Logan's statements were made voluntarily, and not in violation of *Miranda*. Assuming that Logan suffers from a mental impairment, he must still prove misconduct or overreaching on behalf of the police for the court to suppress his statements. *See Colorado* v. *Connelly*, 479 U.S. 157, 164 (1986) (stating that "a defendant's mental condition, by itself and apart from its relation to official coercion, should [never] dispose of the inquiry into constitutional 'voluntariness' "); *United States* v. *Newman*, 889 F.2d 88, 94 (6th Cir.1989) (stating that evidence that a defendant suffered from a condition or deficiency that impaired cognitive or volitional capacity is never enough to show that his statement was involuntary, as "some element of police coercion is always necessary"). Here, Logan presented no evidence of coercion. Rather, to the extent that Logan agreed to be interviewed by ATF agents and transported himself to a distant location for the interview, his conduct supports the inference that his statements were voluntary. Thus, the district court did not err in denying his suppression motion.

7. Victim Impact Statements

Logan argues that the district court erred in permitting nine relatives of the victims of the fire to make highly emotional statements at the sentencing hearing. He contends that Fed.R.Crim.P. 32(3)(C)(E) requires that if victims wish to make a statement, prior notice must be given to the defense. Logan claims that because of their highly emotional content, the statements in this case went beyond the boundaries of permissible victim impact statements, and that he was therefore denied his rights to due process and fair sentencing in violation of the Fifth. Sixth and Eighth Amendments.

We are unpersuaded. Rule 32(3)(C)(E) requires judges to address the victims of violent crimes directly and allow them to make a statement. See Fed.R.Crim.P. 32(3)(C)(E) (1994). Here, relatives of the victims were properly afforded an opportunity to speak, as the effect of Logan's conduct on them was relevant to the sentencing determination. Contrary to Logan's assertion, Rule 32(3)(C)(E) does not require notice to a defendant if the victims desire to make a victim impact statement. Consequently, we find no error in the trial court's allowance of victim impact statements.

8. Sentencing

In his last assignment of error, Logan argues that a life sentence does not accurately reflect his attenuated culpability in this case. In reviewing a defendant's sentence, this Court must accept the findings of fact of the district court unless clearly erroneous, and must give due deference to the district court's application of the Sentencing Guidelines to the facts. *See United States* v. *Hill*, 79 F.3d 1477, 1481 (6th Cir.1996). We review de novo the issue of whether the facts, as determined by the district court, warrant the application of a particular Guideline. *See id.* Upon review, we conclude that the district court did not err in imposing a sentence of life imprisonment upon Logan.

Since the arson here resulted in death, the Guidelines directed the district court to "apply the most analogous

guideline from Chapter 2, Part A (Offenses Against the Person)," and the district court assigned Logan a base offense level of 43 for first degree murder. U.S.S.G. § 2K1.4 (1994). Indeed, the statute applicable to Logan's case provides that "[e]very murder . . . committed in the perpetration of, or attempt to perpetrate, any arson . . . is murder in the first degree." 18 U.S.C. § 1111(a)(1994). Moreover, the district court properly held Logan responsible for the scope of the conspiracy, as a participant in a conspiracy is responsible for another conspirator's conduct if the conduct is reasonably foreseeable and in furtherance of the conspiracy. *See Pinkerton*, 328 U.S. at 646-47. The evidence showed that Logan was offered money to set fire to the Howard Johnson, and the guilty verdict reflects that the jurors believed that Logan was a participant in the conspiracy. Hence, the district court did not improperly sentence Logan to life imprisonment.

B. KUMAR

Kumar also raises several claims of error before this Court. Specifically, he challenges (1) the district court's decision not to grant him a separate trial; (2) the admission into evidence of the Travelodge fires and his prior insurance claims; (3) the admission of hear say testimony; (4) the district court's jury instruction on the credibility of a witness; (5) the sufficiency of the evidence supporting his convictions; (6) the prosecutor's comments during closing argument; and (7) the effect of cumulative error on his trial. We address Kumar's claims below.

1. Motion for Severance

Kumar assigns error to the district court's decision not to sever his trial from that of Logan, his co-defendant. Kumar asserts that the district court should have granted his motion to sever because he and Logan had antagonistic defenses and because a joint trial allowed the government to introduce evidence that would not have been otherwise admissible against him in a separate trial. He also contends that severance was warranted because his speedy trial rights were prejudiced when Logan obtained a con-

tinuance of their joint trial. We disagree, and instead conclude that the district court properly denied Kumar's motion for severance.

This Court reviews for an abuse of discretion the district court's decision to deny a defendant's severance motion. *See United States* v. *Moreno*, 933 F.2d 362, 369 (6th Cir.1991). A trial court abuses its discretion "when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard" *United States* v. *Spikes*, 158 F.3d 913, 927 (6th Cir.1998) (internal quotation marks and citation omitted).

Rule 8(b) of the Federal Rules of Criminal Procedure permits joinder of defendants "in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed.R.Crim.P. 8(b) (1994). Thus, "[a]s a general rule, persons jointly indicted should be tried together." *United States* v. *Causey*, 834 F.2d 1277, 1287 (6th Cir.1987). However, if it appears that a single trial will prejudice a defendant, the district court may sever the trial of defendants. See Fed.R.Crim.P. 14 (1994). A defendant bears the burden of proving that a serious risk exists that a joint trial would compromise a specific trial right of his, or would prevent the jury from making a reliable judgment about his guilt or innocence. *See Zafiro* v. *United States*, 506 U.S. 534, 539 (1993). To merit severance, the prejudice to the defendant must therefore be "substantial," "undue," and "compelling." *United States* v. *Warner*, 971 F.2d 1189, 1196 (6th Cir.1992).

First, Kumar argues that the admission of Logan's out-of-court statements to Evans regarding Kumar and Sharma's offer to set fire to the hotel violated his Sixth Amendment right to confrontation, and that because such statements were admissible only as to Logan, severance was required to avoid substantial prejudice to his defense. He further contends that although the court decided to redact portions of taped conversations of Logan's incrimi-

nating statements to Evans, and offered a curative instruction to the jury, these measures were rendered meaningless when Logan testified at trial since the government was then permitted to introduce the tapes in their entirety. Kumar therefore maintains that joinder permitted the admission of evidence that otherwise would have been inadmissible against him in a separate trial.

We are unpersuaded. Logan's statements to Evans did not warrant severance in this case. The admission into evidence of the taped conversations in their entirety did not deny Kumar his Sixth Amendment right to confrontation. Since Logan testified at trial, Kumar had ample opportunity to cross-examine him, this fact remedied any *Bruton* problems that might otherwise have resulted.[9] Although the district court, by pretrial order, disallowed portions of the taped conversations between Logan and Evans to address any *Bruton* problems that might have existed if Logan did not testify at trial, there were no *Bruton* problems once Logan took the stand.

As for oral statements made prior to the fire by Logan to Evans and seeking information from Evans as to whether Kumar and Sharma would actually pay Logan for setting

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[9]In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that admission of a co-defendant's post-conspiracy confession implicating the non-confessing defendant violated the non-confessing defendant's Sixth Amendment rights to confrontation and cross-examination where the co-defendant did not testify at trial. See id. at 132, 136. If the confession clearly implicated the non-confessing defendant for the crimes charged, even a limiting instruction could not remove the taint caused by the lack of opportunity to confront the witness. See *Smith v. Estelle*, 569 F.2d 944, 950 (5th Cir.1978). Hence, where a *Bruton* situation exists, the court may protect the non-confessing defendant's Sixth Amendment rights by (i) exclusion of the confession, (ii) severance of the trial, or (iii) redaction of the confession to avoid mention or obvious implication of the non-confessing defendant. See Richardson v. Marsh, 481 U.S. 200, 209 (1987).

the fire, the district court correctly admitted these statements under Fed.R.Evid. 801(d)(2)(E), which characterizes statements of a co-conspirator during and in furtherance of the conspiracy as non-hearsay. In order for statements to qualify for the hearsay exception under Rule 801(d)(2)(E), a party must prove that (1) the conspiracy existed; (2) the defendant was a member of the conspiracy; and (3) the statements were made during the course of and in furtherance of the conspiracy. *See United States* v. *Pierce*, 62 F.3d 818, 827 (6th Cir.1995); *see also Bourjaily* v. *United States*, 483 U.S. 171, 175-76 (1987). Here, Evans' testimony qualified for admission at trial since there was sufficient evidence of a conspiracy between Kumar, Sharma, and Logan to set fire to the hotel. Moreover, Logan's statements to Evans were made in furtherance of the conspiracy because Logan's purpose for communicating this information was to get reassurance that Kumar and Sharma would pay him if he set the fire. Accordingly, the district court did not abuse its discretion in admitting testimony of Logan's statements incriminating Kumar in the conspiracy to commit arson.

Second, Kumar argues that severance was necessary because he and Logan had antagonistic defense. He also complains that the spillover effect of evidence offered against Logan adversely affected his ability to conduct an effective defense, thereby compromising his opportunity to receive a fair and independent consideration of his guilt or innocence. He asserts that counsel for Logan attempted to mitigate Logan's culpability by undermining Kumar's defense, thereby acting as a "second prosecutor." In interpreting Rule 14, the Supreme Court has recognized that "mutually antagonistic" or "irreconcilable" defenses may be so prejudicial to the defense in some cases to mandate severance. *Zafiro*, 506 U.S. at 538. If antagonistic defenses are present, to merit severance the defendant must demonstrate that the antagonism will mislead or confuse the jury. *See United States* v. *Weiner*, 988 F.2d 629, 634 (6th Cir.1993). The defendant carries a heavy burden of demon-

strating prejudice. *See id.* In our view, Kumar has failed to carry that burden.

At the outset, we observe that Kumar and Logan's defenses were not necessarily antagonistic. Although Logan's counsel stated that "the essence of [Logan's] defense is that Earnest Evans did set the fire. Whether he did it on behalf of Mr. Kumar we don't care[,]" such statements do not necessarily implicate Kumar in the unlawful activity. However, even assuming that Logan's defense may have at times emphasized evidence that incriminated Kumar, Kumar does not contend that these tactics misled or confused the jury. *See Causey*, 834 F.2d at 1287 (finding that a request for severance should be denied if a jury can properly compartmentalize the evidence as it relates to the appropriate defendants). Under the facts of this case, severance was not required since Kumar failed to make the requisite showing that antagonism between he and Logan misled or confused the jury. Indeed, the trial court instructed the jury to consider separately the proof against each defendant with reference to each offense charged. Moreover, while there is always a danger that a jury will convict on the basis of cumulative evidence rather than on the evidence relating to each defendant, we shall adhere to the view that "the jury must be presumed capable of sorting out the evidence and considering the case of each defendant." *United States* v. *Warner*, 690 F.2d 545, 553 (6th Cir.1982).

Finally, Kumar argues that his rights to a speedy trial were violated when the trial court granted Logan's motion for continuance, and that this gave rise to grounds for severance. We believe this claim is without merit. Kumar makes no showing that the delay resulting from the district court's grant of Logan's motion for a continuance hindered his ability to prepare his defense or substantially prejudiced his case. Moreover, a defendant's right to speedy trial is not violated by the grant of a continuance in a joint trial where one defendant asks for reasonable time to undergo a mental examination. *See* 18 U.S.C. § 3161(h)(1)(A)

(1994). Accordingly, we conclude the district court did not abuse its discretion in denying Kumar's motion for a speedy trial and for severance based on Kumar's objection to Logan's motion for a continuance.

2. Evidence of Prior Acts

Kumar next argues that the district court erred by admitting (i) evidence of five fires at Kumar's Travelodge hotel in Nashville between February and November 1995; and (ii) evidence of fraudulent insurance claims filed in response to those fires. While Kumar acknowledges that the district court admitted evidence of the fires and insurance claims to prove existence of a "common scheme" or "plan," he claims that the evidence should have been inadmissible because there was no factual basis for concluding that he set the fires, and that the prejudice to him therefore substantially outweighed the probative value of the evidence. We find these arguments lacking in merit.

In reviewing a district court's determination to admit evidence of "other crimes, wrongs, or acts," this Court first reviews for clear error the district court's factual determination that other acts occurred. *See United States* v. *Merriweather*, 78 F.3d 1070, 1074 (6th Cir.1996). We then review de novo the district court's legal determination that the evidence was admissible for a legitimate purpose. *See id.* Finally, we examine for abuse of discretion the district court's determination that the probative value of other acts evidence is not substantially outweighed by its prejudicial effect. See id. (citations omitted).

Rule 404 generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on one's character. *See* Fed.R.Evid. 404. "Similar act" or "other bad act" evidence, however, may be admissible if such evidence bears upon a relevant issue in the case. *See* Fed.R.Evid. 404(b). This Court applies a three-step analysis to evaluate the admissibility of evidence under Rule 404(b). *See United States* v. *Johnson*, 27 F.3d 1186, 1190 (6th Cir.1994). A party seeking to admit 404(b) evidence must first dem-

onstrate that the other bad acts occurred. *See id.* The party must then cite a specific purpose for which the evidence is offered, after which the trial court must determine whether the probative value of the identified purpose outweighs the risk of unfair prejudice. *See id.* Thus, a party seeking admission of "other acts" evidence must show that the evidence is probative of a material issue other than character. *See Huddleston* v. *United States*, 485 U.S. 681, 686 (1988).

In this case, evidence of prior fires and their accompanying insurance claims was admitted for the relevant purpose of showing a "common plan," and its probative value substantially outweighed the prejudicial effect to Kumar's defense. Such evidence showed Kumar's common plan of committing arson to fraudulently obtain insurance proceeds to renovate his hotels and bring them into compliance with franchise agreements. The government presented sufficient evidence that these "other bad acts" occurred and that they were sufficiently similar to the Howard Johnson incident to reflect a "common scheme" and Kumar's participation in that scheme. Evidence showed that (1) Kumar had ownership interest in both hotels, (2) both hotels were in the same financial state of distress, (3) both hotels were in poor condition and had failed quality assurance inspections from their respective franchisers; (4) the franchisers of both hotels had threatened to terminate the franchise contract unless significant improvements were made; and (5) both hotels caught afire. Moreover, the fires at the Travelodge were similar in nature to the fire that occurred at the Howard Johnson, and occurred within a relatively short nine months preceding the Howard Johnson fire. *See United States* v. *Ismail*, 756 F.2d 1253, 1258 (6th Cir.1985) (noting that for prior bad acts to be admissible, the acts "generally must be relevant to a matter at issue, and must be substantially similar to, and near in time to, the offense charged in the indictment").

Additionally, evidence showed that Kumar ordered hotel employees to clean a burned guest room prior to the fire investigator's inspection, thereby preventing the in-

spector from making a determination of the fire's cause. Kumar also fabricated an arson suspect in the second fire, and instructed an employee to give perjured testimony that the suspect ran from the scene of the fire Kumar also recruited a former employee to set fire to the telephone system in the hotel so that he could file an insurance claim to have the telephone system repaired. All of the fires occurred in unoccupied rooms with no sign of forced entry, and Kumar stood to and apparently did profit from each of the fires by filing false insurance claims. Contrary to Kumar's contention, the government submitted sufficient evidence that Kumar participated in arson fires. Indeed, the cumulative effect of the evidence shows a "common plan" of setting fires and then using insurance proceeds to renovate dilapidated hotels. *See United States* v. *Blankenship*, 775 F.2d 735, 739 (6th Cir.1985).

Further, Kumar was not unduly prejudiced by the admission of evidence to demonstrate his "common scheme" or "plan." As we have observed, "[u]nfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest a decision on an improper basis." *Bonds*, 12 F.3d at 567. Additionally, the trial court minimized any prejudice to Kumar's defense by admonishing the jury throughout trial and in a final jury instruction that the "other acts" evidence could only be considered for a limited purpose. Thus, the district court did not abuse its discretion in admitting evidence of prior Travelodge fires and insurance claims, as it showed conformity with a "common scheme," and its probative value substantially outweighed its prejudicial effect.[10]

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[10]Although Kumar claims that evidence of the fire on February 13, 1995, which Kumar claims was ruled accidental in origin, was improperly admitted at trial, we believe any such error was harmless. Indeed, at least three of the remaining Travelodge fires were deemed arson fires. Any error that occurred by admitting evidence of one fire possibly ruled accidental was harmless and does not require remand for a new trial.

3. Admission of Hearsay

Kumar asserts that the testimony of witness Joyce Smith constituted inadmissible hearsay. We reverse a district court's determination that evidence falls within a hearsay exception only where the court has abused its discretion. *See United States* v. *Lloyd*, 10 F.3d 1197, 1216 (6th Cir.1994). Kumar claims that because Smith's testimony corroborated the testimony of Evans and Logan, two unreliable witnesses, the testimony substantially prejudiced his defense. This argument lacks merit.

The district court admitted Smith's testimony under the present sense impression exception to the hearsay rule. Rule 803(1) of the Federal Rules of Evidence allows the admission of "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Fed.R.Evid. 803(1)(1994). The availability of the declarant as a witness is immaterial. See id. Here, Smith testified that four days before the fire at the Howard Johnson hotel, she overheard the desk clerk tell Sharma that he had a telephone call from Kumar, and that Logan was waiting outside of Sharma's office and entered his office as she left. The desk clerk's statement to Sharma was made while the desk clerk was perceiving the event she described-Kumar's presence on the telephone call to Sharma. The desk clerk's statement, through the testimony of Smith, therefore fell under the present sense impression hearsay exception. See Fed.R.Evid. 803(1). Thus, the district court did not abuse its discretion in admitting Smith's testimony.

4. Jury Instructions

Kumar further claims that the district court erred by refusing to instruct the jury to consider Evans' protection from prosecution as a factor in weighing his credibility as

a witness.[11] Although Kumar acknowledges that the government did not enter into a formal, written immunity agreement with Evans in order to procure testimony, he asserts that Evans received the benefit of a "de facto" immunity agreement since Evans avoided state and federal prosecution for unpaid child support, lying to ATF agents, and perjury. Thus, Kumar maintains that his defense was substantially prejudiced because the district court failed to admonish the jury about the possibilities of prejudice and unreliability of a witness that testifies under immunity. We are not persuaded.

We review a district court's failure to give a particular charge as requested for an abuse of discretion. *See United States* v. *Frost*, 914 F.2d 756, 764 (6th Cir.1990). In evaluating a claim of error in a trial court's charge to the jury,

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[11]Kumar asked the district court to instruct the jury as follows:

> (1) You have heard the testimony on behalf of the government of Earnest Evans who was investigated for the charged crimes and who admitted to giving false information to federal law enforcement officers. You have also heard or can conclude that the government has promised him or that Earnest Evans understands or anticipates that he will not be prosecuted in exchange for his testimony against the defendants.
>
> (2) It is generally permissible for the government to make explicit or implicit promises not to prosecute someone. But you should consider his testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by [an] explicit or implicit promise not to prosecute.
>
> (3) Do not convict Sam Kumar based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt and the testimony proves each and every element of the offenses charged beyond a reasonable doubt.
>
> (J.A. at 624)

we must determine whether the charge, when considered as a whole, "fails accurately to reflect the law." *United States* v. *Busacca*, 863 F .2d 433, 435 (6th Cir.1988). A trial court's exercise of its discretion in charging the jury should be reversed only if the instructions "taken as a whole" are "misleading" or give an "inadequate understanding of the law." *United States* v. *Buckley*, 934 F.2d 84, 87 (6th Cir.1991).

Kumar's argument is unsupported by the record, which indicates that the district court issued a cautionary instruction regarding Evans' testimony that was substantially similar to the instruction proposed by Kumar. The district court instructed the jury as follows:

> You have heard the testimony of Earnest Evans. You have also heard that he received money from the government in exchange for providing information.
>
> The use of paid informants is permissible. But you should consider Evans' testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by what the government gave him.
>
> Do not convict any defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

(J.A. at 678.) Consequently, the trial court instructed the jury in a manner substantially in accordance with the tendered instruction. *See United States* v. *Townsend*, 796 F.2d 158, 163 (6th Cir.1986) (noting that "the refusal to give a requested instruction will not be overturned if the requested instruction was substantially included in the instruction already given"). We therefore conclude that the district court did not abuse its discretion by declining to give Kumar's requested jury instruction.

5. Prosecutorial Misconduct

Kumar also asserts that the government committed prosecutorial misconduct by misstating the evidence in its closing argument. In particular, he claims that the govern-

ment misrepresented that (1) he was on the phone when Sharma offered Logan money to set fire to the Howard Johnson; (2) Sharma made a call to Logan while at Kumar's residence in order to confirm plans to set the fire; and (3) the fires at the Travelodge were intentionally set, with Kumar's knowledge and at his direction so as to allow the hotel to be renovated with insurance proceeds. We disagree.

Because Kumar failed to object to the prosecutor's comments at trial, we review his claim for plain error. *See United States* v. *Carroll*, 26 F.3d 1380, 1383 (6th Cir.1994). We find plain error "only in exceptional circumstances," and only when the error is so plain that "the trial judge and prosecutor were derelict in countenancing it" *Id* In *Carroll*, this Court established a framework to review claims of prosecutorial misconduct 26 F.3d at 1384-90. First, we determine whether the prosecutor's statements were improper. *See id* at 1385. If the comment was not flagrant, reversal is proper only when "(i) the proof against the defendant was not overwhelming, (ii) opposing counsel objected to the conduct, and (iii) the district court failed to give a curative instruction." *United States* v. *Brown*, 66 F.3d 124, 127 (6th Cir.1995) (citing *Carroll*, 26 F.3d at 1384-90).

Here, evidence was introduced at trial supporting each of the prosecutor's remarks; therefore the remarks were not improper. Smith, whose testimony was properly admitted under Fed.R.Evid. 803(1), testified that the desk clerk told Sharma that he had a telephone call from Kumar, upon which Kumar invited Logan into his office. Logan and Evans testified that Kumar and Sharma offered Logan money and board to set a fire in the hotel. As for proof that Sharma called Logan while at Kumar's residence to confirm the plans for the fire, the government introduced phone records which indicated that two calls were placed on January 4, 1996 from Kumar's residence to the Howard Johnson where Logan then resided at around the time Evans claimed the calls were received. The government

also presented evidence implicating Kumar in setting the fires at the Travelodge, including evidence that (1) Kumar filed false insurance claims and used those proceeds to renovate the hotel, (2) he had an employee falsely accuse someone of setting one of the fires; and (3) Kumar had in fact himself asked a former employee to "smoke up the phone system." Hence, we conclude that the government did not commit prosecutorial misconduct during closing argument.

6. Sufficiency of the Evidence

Kumar asserts that the government failed to establish the jurisdictional element of 18 U.S.C. § 844(i) that the Howard Johnson had a substantial effect on interstate commerce. To support his contention that the hotel did not substantially effect interstate commerce, Kumar points out that (1) the government presented testimony of only three hotel guests in its case- in-chief and all three guests resided in Kentucky, and (2) the hotel was a struggling operation that had to lay off several employees in December 1995 due to a seasonal downturn in occupancy. Kumar also argues that there is insufficient evidence to support his convictions for arson, mail fraud, and conspiracy, and that therefore the trial court erred by overruling his motion for a directed verdict. He asserts that the government's case against him consisted of nothing more than "hearsay, speculation and perjury" and that no rational factfinder could have found the essential elements of the crime beyond a reasonable doubt. (D. Br. at 45.) We find these contentions lacking in merit.

In reviewing a claim for sufficiency of the evidence to support a conviction, we must view all evidence in the light most favorable to the prosecution to determine if a rational factfinder could have found the elements of the crime beyond a reasonable doubt. *See Jackson* v. *Virginia*, 443 U.S. 307, 319 (1970). The statute under which Kumar was convicted required proof beyond a reasonable doubt that Kumar maliciously damaged, by means of a fire, a building used in interstate commerce or in an activity af-

fecting interstate commerce. See 18 U.S.C. § 844(i) (1994). Thus, the government was required to prove beyond a reasonable doubt that the Howard Johnson was used in interstate commerce or in an activity affecting interstate commerce. The "used in interstate commerce" element is satisfied if the government proves that the building in question has some relationship to an activity of a commercial nature. *See United States* v. *Andrini*, 685 F.2d 1094, 1095-96 (9th Cir.1982). The government need only establish a minimal connection between the property and some aspect of interstate commerce. *See United States* v. *Hicks*, 106 F.3d 187, 190 (7th Cir.1997).

In this case, the government introduced evidence that guests staying at the hotel traveled in interstate commerce, as the Howard Johnson operated as a commercial business, providing temporary services to people traveling in interstate commerce, that the hotel had an insurance contract with an out-of- state insurance company, and that the hotel had a franchise contract with an out-of-state franchiser, which resulted in regular mail and telephone communication. The law required only a minimal connection between the property and some aspect of interstate commerce, and the government produced adequate proof at trial to show that the hotel had a substantial effect on interstate commerce. We therefore find that sufficient evidence supports Kumar's § 841 conviction.

As for the remainder of Kumar's convictions, we find that as a whole, the record demonstrates that a rational factfinder could have found the essential elements of each of those crimes beyond a reasonable doubt. Specifically, the government presented sufficient evidence at trial for the jury to find Kumar guilty of the unlawful activity charged by introducing (1) testimony regarding Kumar's presence on the phone when Sharma offered Logan money to set the fire; (2) evidence of prior fires and fraudulent insurance claims to establish a "common scheme" to renovate his hotels with insurance proceeds; (3) evidence that Kumar directed an employee to falsely accuse an individual

of arson; (4) evidence that Kumar asked an employee to "smoke up" the wires to the hotel phone system. Viewing the evidence in the light most favorable to the prosecution, we conclude that the cumulative effect of the evidence supports Kumar's conviction on all counts. *See United States* v. *Peters*, 15 F.3d 540, 544 (6th Cir1994) (stating that "[c]ircumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt").

7. Cumulative Error

In his last assignment of error, Kumar maintains that he is entitled to a new trial due to the cumulative effect of the individual errors he has raised before this Court. He thus maintains that even if this Court determined that individual errors which occurred were harmless, he is entitled to relief on the basis of cumulative error. *See United States* v. *Parker*, 997 F.2d 219, 221 (6th Cir.1993) (finding that in order to obtain relief on the basis of cumulative error, a defendant must establish that the combined effect of individually harmless errors was so prejudicial that he was not afforded due process). However, as we have explained, there are no individual errors which warrant reversal in Kumar's case. Therefore, reversal based on cumulative error is not warranted here.

IV.

For the reasons given above, we AFFIRM the judgment of the district court as to the convictions and sentences of both Logan and Kumar.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

97-5912/5914

UNITED STATES OF AMERICA, - *Plaintiff-Appellee,*

v.

JOE A. LOGAN, SR. and SURESH KUMAR a/k/a SAM KUMAR, - *Defendants-Appellants.*

BEFORE: GUY, COLE, and CLAY, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk